PACLINE (M) SDN. BHD.

v.

TAN KIM FOONG

HIGH COURT MALAYA, SHAH ALAM
DATO' MAHADEV SHANKAR J.
[ORIGINATING MOTION NO. 25-3-1994]
13 JULY 1994

LAND LAW: Caveat - Binding the whole land - Caveator has limited interest - Application to set aside caveat heard exparte - Section 327 National Land Code.

PRACTICE & PROCEDURE: Minutes made by Judge in the absence of Counsel - The effect of it.

Kwan Yoon Fatt and Sons Sdn. Bhd. (KYF) were the registered owners of a certain piece of land. On 12 July 1988 KYF entered into a written development agreement with Trends, a developer. Trends were authorised to develop by way of a joint venture. Trends had sold or purportedly sold units in the housing project to sub-purchasers.

On 13 January 1994 the plaintiff applied *exparte* to set aside the caveat entered on the whole piece of land by the defendant. The Judge who was supposed to have heard this case had minuted that the application to set aside the caveat be served on the defendant, however this was not done. The defendants complaint is that she was not given prior notice of the removal of her caveat.

Held:

[1] The defendant's alleged interest in this case was the purchase of one unit in a housing estate. Even assuming that everything she said in her statutory declaration is true her caveat was in law a nullity because she attempted to bind the whole of the said land.

[2] The minute made by the Judge was made in the absence of Counsel representing Pacline, and it can only be treated as an administrative direction. It did not and could not have effect as a Court order. Order 8 r. 2 of the Rules of the High Court 1980 is self-explanatory. Pacline's solicitors were entitled to urge that s. 327(1) of the National Land Code expressly permitted them to apply *exparte*.

[Defendants application dismissed with costs].

Cases referred to:

Overseas Investment Pte Ltd v. Anthony O'Brien & Anor. [1988] 3 MLJ 332 ***(dist)***
Tan Heng Poh v. Tan Boon Thong & Ors. [1992] 2 MLJ 1 ***(foll)***

Legislation referred to:

Control & Licensing Regulations 1989, Reg. 11 (1) Sch. H.
National Land, ss. 325, 326
Rules of the High Court 1980, O. 8 r. 2, O. 41 r. 5(1)
Legal Profession Act 1976, s. 37

For the plaintiff - Logan Sabapathy (David Morais with him); M/s. Logan Sabapathy & Co.
Defendant in person

JUDGMENT

Mahadev Shankar J:

The main issue in this case is whether an *exparte* order obtained by the plaintiff (Pacline) for the removal of the defendant's caveat should be set aside.

Unfortunately serious complications have arisen out of and incidental to allegations made by the defendant not just in this Court but to diverse other personages that Pacline's Counsel Mr. Logan Sabapathy obtained the *exparte* order by an alleged fraud.

Some background information is vital to the understanding of this case. Kwan Yoon Fatt and Sons Sdn. Bhd. ("KYF") were the registered owners of the lands comprised in EMR 2266, EMR 2267, EMR 2268, EMR2269 and EMR 2270 for Lots 840, 841, 842, 849 and 843 in the Mukim of Ampang. The total area was just under 5½ acres. This land in its totality is hereafter referred to as the said land. In November 1993 new titles by way of Grants were issued in substitution of these Entries in the Mukim Register. These new titles were numbered GM 217, 218, 219, 220 and 221. The lot the land they covered remained the same.

Trends Building Sdn. Bhd. (Trends) is in business as a developer. The major and controlling shareholder of Trends is a Madam Pan Ah Lan also known as A.L. Pan. She is a Director of Trends. She is also the mother of the defendant Tan Kim Foong. Tan Kim Foong in turn is the wife of Alfred Kuan Yok Foh who is an architect.

On 12 July 1988 KYF entered into a written agreement with Trends (the development agreement). This agreement is already the subject of litigation in other actions filed in this Court. I only need to state here that under its provisions KYF remained the registered proprietor of the said lands. Trends were authorised to develop it by way of a joint venture. Alfred Kuan Yok Foh was appointed as the architect for this housing project. He was given the responsibility for submitting layout plans, applying for conversion and sub-division and generally doing all things required to obtain the necessary approvals from the various authorities and then ensuring that the project was completed. All this was to be at the developer's expense.

The application for the various approvals would have required the signature of KYF as landowner. Clause 8 of the development agreement required KYF to grant a Power of Attorney to Trends to sign the necessary applications. Trends nominated its director Eng Yong Seng to be the attorney and on 8 August 1988 KYF executed such a power in his favour.

The development agreement envisaged that KYF would be given a prior right to designate the number and location of units in this housing project worth RM1 million as soon as the layout plan had been approved. These units were to belong to KYF upon completion and they are described as the land owners housing units in the development agreement. The remaining units were referred to as "the developer's housing units and/or flats." Clause 25 of the development agreement provided as follows:

> ..The developer's housing units and/or flats shall be sold by the developer upon such terms and conditions as the developer shall deem reasonable but in accordance with the Housing Developers (Control and Licensing) Act, 1966 and the regulation thereunder **provided** that the directors of the developer shall indemnify and keep indemnified the land owner against all claims howsoever caused as a result of any

breaches in the sale and purchase agreement to be entered into between the developer and the purchasers thereof .

Before Trends and KYF had carried out their respective obligations under the development agreement to their mutual satisfaction, Trends started to sell individual units in this project to various people. The sale and purchase agreements for these units had to comply with the statutory form required by the Housing Developers (Control & Licensing) Regulations 1989-Regulation 11 (1) Schedule H. Trends used a printed form which is in line with schedule H. I propose to assume for the purpose of this judgment that wherever Trends entered into sale & purchase agreements with sub-purchasers the forms used was the same as that Trends concluded with one Tan Soo Leng on 15 July 1991. (See enc. 8 ex. p. 88). I have noted that the printed form states that Trends is the registered owner of the said land.

This is not strictly correct. At all material times the registered owner of the said land was Kwan Yoon Fatt and Sons Sdn. Bhd. (KYF) and after them Pacline.

It is reasonable to assume that Trends must have expended considerable effort and incurred substantial expenditure in getting this project to the point it reached in June 1992. Unfortunately serious differences broke out between the parties and on or about 2 June 1992 KYF terminated the development agreement. The Power of Attorney to Eng Yong Seng was revoked and the revocation was registered.

A feud then broke out. The nominal warriors were Trends on the one side and KYF on the other. The real combatants were the two families. KYF's campaign was led by Kwan Yoke Oon. He is a Director of KYF, a son of Kwan Yoon Fatt, and cousin of Alfred Kuan. Kwan Yoke Oon is supported by Kwan Yen Yuen also a director. On the Trends' side was Alfred Kuan, his wife Tan Kim Foong, her mother Pan Ah Lan and others.

In between KYF and Trends were the sub-purchasers to whom Trends had sold or purportedly sold units in the housing project.

On 3 July 1992 KYF sold the said lands to Pacline (M) Sdn. Bhd. (Pacline) who could not register their transfer because of four caveats. These were successively filed each after the earlier one was removed by order of this Court. Up till November 1993 the title deeds were the EMRs earlier referred to. The caveats were registered on those titles. In November 1993 the new titles were issued. The 4th caveat had been removed and Pacline was registered as the owner. The land was still the same. I must now refer to these four caveats.

The **first caveat** was entered by Trends on 30 June 1992. KYF and Pacline applied in SP 25-49-92 for its removal. Pan Ah Lan affirmed the statutory declaration in support of the caveat. She alleged that KYF held the said lands in trust for Trends under the development agreement. KYF and Pacline denied this. Numerous affidavits were filed by both parties who were represented by Counsel. The matter was fully argued in open Court before YA Tuan Hishamuddin. On 8 March 1993 he ordered the first caveat to be removed. An application for stay of execution was dismissed on 17 June 1993. It appears that an appeal was filed on 17 March 1993 but Trends had some difficulties with its solicitors and the appeal records were not filed in time.

I would add here that YA Tuan Hishamuddin gave a full written judgment (the said judgment) on 8 March 1993 as to why Trends did not have a caveatable interest. That same day Trends filed civil suit 22-11-93 in this Court naming KYF, KYF (as trustees) and Pacline as defendants. The substantial relief sought was that Trends was the beneficial owner of the said lands and for damages for breach of the development agreement.

On 1 June 1993 Trends lodged a second caveat against the said land. It was registered on the EMR titles. The statutory declaration was sworn by Pan Ah Lan. The grounds were substantially similar to those urged for the first caveat. In addition it was claimed that Trends had obtained a default judgment in CS 22-111-93. When Pacline found its application to register its transfer blocked by the second caveat it applied in OM 25-34-93 for the removal of this second caveat because it was based on the same grounds that Y.A. Hishamuddin had rejected and because the default judgment had been set aside on 25 May 1993. Both Trends and KYF were represented when I ordered the removal of the second caveat on 30 July 1993. There was no appeal.

Despite these two orders Trends entered a third caveat against the said lands on 2 August 1993 ie three days after second caveat was ordered to be removed. The statutory declaration we again affirmed by Pan Ah Lan. The grounds are substantially similar to those she urged in support of the first caveat.

KYF and Pacline applied for its removal in for UP25-42-1993. I ordered its removal *exparte* on 11 August 1993 after hearing a submission by Mr. Logan Sabapathy who referred to the said judgment and the two earlier caveats.

It would appear that Pacline was able to register the transfer of the said land to itself on 12 August 1993. The memorials were made on the EMR in titles.

That Trends were aware of this order of removal is evident from the fact that on 14 October 1993 Trends lodged a fourth caveat against the said lands. This time the application was made by Kwan Boon Teck and Pan Ah Lan as Directors of Trends. The grounds alleged again are substantially similar to the grounds alleged in the earlier application namely that there was a default judgment which they allege was set aside by fraud and that the said lands were held by KYF in trust for Trends and that the transfer to Pacline was in breach of that trust and that therefore Pacline held the said land as bare trustee for Trends. In this fourth application Trends named the EMR titles as the subject of the caveat.

About this time the new GM titles were in the process of being issued, and they were infact issued on 9 November 1993. Pacline was named as the registered proprietor of all the lots comprising the said land. The only existing encumbrance against the said lands was the fourth caveat aforesaid lodged on 14 October 1993. It was carried over on to the new GM titles and appear thereon as the first encumbrance thereon.

Pacline applied *exparte* on 13 January 1994 by OM 25-2-94 to have this fourth caveat removed. They supported their application with two affidavits which were sufficient to convince me *prima facie* that the grounds on which the fourth caveat was lodged was substantially the same as the earlier caveats. On 20 January 1994 I ordered this caveat to be removed also.

The same day ie 13 January 1994 Pacline applied *exparte* by UP 25-3-94 for another caveat to be set aside. This was the fifth caveat against the said lands. It was the first caveat lodged by Tan Kim Foong the present defendant on 15 November 1993. The caveat application refers to the EMR titles but these were deleted and the GM title numbers were substituted so it must have been obvious to her that the land involved was the same.

In the accompanying statutory declaration dated 12 November 1993 Tan Kim Foong stated:

(1) that Trends a licensed housing had received RM5,500 being 10% for an apartment No. GA8 to be built on the said land and she had thereby acquired an interest in the said land;

(2) that KYF was at all times registered as the owner of the said land;

(3) that the development agreement dated 12 July 1988 constituted KYF a trustee of the said land for Trends;

(4) that on 8 November 1990 Trends and KYF had entered into a supplemental agreement whereby both of them had declared and warranted that KYF would be a party to the sale & purchase agreement and comply with the regulations;

(5) that in breach of trust KYF had transferred the the land to Pacline to the injury of TBSB and the purchasers of the units;

(6) that KYF and Pacline had common directors and Pacline was aware of KYF's position as trustee of the said lands for Trends;

(7) That Pacline's title was therefore defeasible

(8) That KYF had offered to settle Tan Kim Foong' s claims

(9) That KYF had transferred the said lands to Pacline in breach of trust and fraudulently with intent to deprive the innocent purchasers of housing units in the said land.

This originating motion should have been heard by my brother YA K.C. Vohrah. It was accompanied by a certificate of urgency signed by Mr. Logan Sabapathy. The Registrar read the papers the very day they were filed and wrote a minute to the Judge who noted on the minute on 14 January 1994 - "Fix a date after I have come back from Alor Star. To be served"

In consequence Pacline's solicitors were unable to see that Judge at all. On the grounds of his inavailability and the urgency of the matter I was persuaded to give them a hearing on 20 January 1994, after I had dealt with OM 25-2-94 which dealt with the same subject matter.

In view of the subsequent developments I think it desirable to set out in full here the note of those proceedings:

In Chambers
20 January 1994.

Logan Sabapathy for applicant.

In this matter three caveat proceedings previously by Trends Building.

In first caveat proceedings and in other two of Trends Building sought to raise rights

third parties under sale & purchase agreements purportedly on behalf of the land owner.

In 1st caveat proceedings caveat removed because sale was in excess of P/A powers.

Trends Building said 8 purchasers in 1st proceedings.

The present defendant was never indicated as such a purchaser. He appeared as attesting witness to Trends Builders. The present caveat seeks to bind the whole of the lands. This is not possible. *Tan Heng Poh v. Tan Boon Thong & Ors.* [1992] 2 MLJ 1. OIT of enclosure 1.

T.T. Hakim Dato' Shankar.

At the outset I said that the core issue here involves a simple question of law. Tan Kim Foong's alleged interest in this case was the purchase of one unit in a housing estate. Even assuming that everything she said in her statutory declaration is true her caveat was in law a nullity because she attempted to bind the whole of the said lands. The case cited to me by Mr. Logan Sabapathy was a decision of the Supreme Court and it was binding upon me. The fourth *ratio* was conclusive. It reads:

> As the appellant was only entitled to a one-sixth share in the estate, the caveat was not capable of being registered by virtue of the new proviso to s. 322(1) of the Code which expressly prohibits the entry of a caveat in respect of a claim involving a limited title or interest in the alienated land. Only if the caveator's claim to be beneficially entitled under the trust affecting the title or registrable interest had related to the whole land would the caveat be entered but not otherwise.

That was the only legal reason which motivated me to make the *exparte* order on 20 January 1994.

As regards my powers to do so I refer to s. 327 of the National land Code which reads:

> 327.(1) Any person or body aggrieved by the existence of a private caveat may at any time apply to the Court for an order for its removal, and the Court (acting, if the circumstances so require, *exparte*) may make such order on the application as it may think just.
>
> (2) The Registrar shall, on being duly served with any order under this section for the removal of a caveat, cancel the entry thereof on the register document of title, and note thereon the reason for the cancellation and the date thereof.
>
> (3) Every cancellation under sub-section (2) shall be signed and sealed.

On 16 February 1994 Pacline's solicitors served the removal orders I made for Trends 4th Caveat and Tan Kim Foong's caveat upon the Registrar of Titles and he duly cancelled these caveats.

However shortly after her caveat was cancelled Tan Kim Foong examined the Land Office titles to the said lands and found that her caveat was cancelled by the order of this Court dated 20 January 1994. The memorial gave details of this originating motion no. 25-3-94 which she noted.

On 21 February 1994 at 3.15 p.m. she handed a letter to the PTD Hulu Langat and requested that he file a Registrar's caveat on the grounds alleged in her statutory declaration dated 12 November 1993.

He did so immediately. Pacline commenced proceedings against him for the removal of his caveat on 11 April 1994 by UP 25-14-94. This is the subject of a separate judgment.

a To return to Tan Kim Foong, she came to this Court on 22 February 1994, made an official search of the Court file, and on 24 February 1994 she wrote to the Chief Justice complaining that Pacline's solicitors had misled the Court by saying that her caveat was the fifth one she had lodged and that her caveat had been cancelled without due notice to her.

b On 1 March she searched the Court file again and then went to the Shah Alam police station where she made a police report that Mr. Logan Sabapathy had fabricated false evidence by alleging that Tan Kim Foong's caveat was the fifth one she had lodged. On 11 March 1994 she wrote again this time to me in my capacity as the Judge of this case enclosing the police report made against Mr. Logan Sabapathy. Copies of this letter were sent by her to the Chief Justice and the Registrar.

c The Court's reply to her was posted on 22 March 1994. (She was told what she must have known since 22 February. That her caveat was removed pursuant to an *ex-parte* order on the grounds stated in the affidavits filed in support). She was invited to apply to set aside the order and apply for any further order deemed just with an assurance that her application would be heard soonest possible.

d She did not file her application until 26 May 1994.

On 21 February 1994 (the same day Tan Kim Foong applied for the Registrar's caveat), one Tan Wee Yoong filed a caveat against the said lands. The grounds alleged in this person's statutory declaration dated 21 February 1994 are identical to those alleged by Tan Kim Foong in her statutory declaration dated 12 November 1993 except that Tan Wee Yoong alleges the purchase of an apartment GA7. With
e the assistance of the same PTD Tan Wee Yong caveated the whole of the lands.

Pacline filed OM 25-12-94 on 25 Mac 1994 to have this caveat removed. I heard this application *inter partes* on 3 June 1994 and ordered the caveat to be removed. The reasons are contained in a separate judgment.

Stung by the repeated caveats lodged against the said lands KYF and Pacline
f commenced a civil suit 22-55-94 on 4 February 1994 against Trends, Alfred Kuan and seven other persons who claimed to be purchasers. Tan Kim Foong was named as the 9th defendant in these proceedings.

The main relief sought in this action was for a declaration that Trends and their alleged sub-purchasers were not entitled to lodge caveats against the said land. Together with the writ KYF and Pacline also filed a summons-in-chambers for an
g interlocutory injunction against Trends and their alleged sub-purchasers that pending trial of this action they should not be permitted to file any further caveats unless they had first obtained leave of this Court. These cause papers were served on Tan Kim Foong on 28 March 1994.

This summons-in-chambers in civil suit 22-55-94, Pacline's application in originat-
h ing motion 25-12-94 to remove the caveat of Tan Wee Yong and Pacline's application in OM 25-14-94 to remove the Registrar's caveat, all involved common questions of law and fact and I heard them one after the other on 2 and 3 June 1994.

In the course of these hearings it became apparent that Tan Kim Foong's application filed on 26 May 1994 in OM 25-3-94 had not been served on Pacline. This application to set aside the *exparte* order against her also involved the same subject matter and
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common questions of law and fact. It was therefore called up in open Court on 3 June and she was directed to serve Pacline's solicitors soonest possible.

This she did not do. Instead by a letter dated 6 June 1994 to the Registrar (with copies to the Judge and Chief Justice) she intimated that she and eight others had filed a writ against Pacline, and as a result she wished to apply formally to withdraw her summons dated 26 May 1994 and replace it with a new summons-in-chambers filed on 6 June 1994. These papers she served on Pacline's solicitors on 10 June 1994.

She was now asking for the maintenance of the Registrar's caveat until the suit that she and eight other alleged sub-purchasers from Trends which she had filed on 6 June 1994 or the suit no. 22-111-93 filed by Trends had been tried. The Registrar's caveat was properly the subject matter of UP 25-14-94. The remaining prayers were a repetition of her prayers in her summons dated 26 May 1994.

I will pass over the issue as to whether she could effectively amend her applications in this way without leave of the Court.

The main ground of Tan Kim Foong's complaint is that she was not given prior notice of the removal of her caveat. Admittedly if the land owner had proceeded under s. 325 or 326 of the National Land prior notice would have had to be given to the caveator before the caveat can be cancelled. But Pacline in this case moved under s. 327 which expressly allows the application to be made *exparte*.

Where a matter is claimed to be urgent and the Judge who would normally hear the matter is not available, it is quite in order for the applicant to approach another Judge in the same Court and this is why the Registrar referred the matter to me on 20 January 1994. After I heard Mr. Logan I was in no doubt whatsoever that even if everything Tan Kim Foong said in her statutory declaration was true her caveat was a nullity. The Supreme Court decision cited earlier makes that clear beyond a shadow of a doubt. This was the sole factor which operated upon my mind. Whether this caveat was the first or the fifth was quite irrelevant and immaterial to this application.

In open Court when parties made their final submissions in this matter on 24 June 1994 Tan Kim Foong who acted in person said that she had been assisted in the preparation of the documents used in this case by a third year law student whose name she refused to disclose.

It is very probable that Tan Kim Foong felt that there were sinister forces at work when she discovered that her caveat was cancelled without giving her an opportunity to be heard. She had a legitimate grievance on this account which was directly brought about by the total failure of Pacline's solicitors to serve her with a copy of the *exparte* order made on 20 January 1994. The manner in which she then went about ventilating her grievances raises other issues which must now be dealt with.

The factual basis of her accusations against Mr. Sabapathy rests on the statement in the Registrar's Minute of 13 January that this was the fifth caveat Tan Kim Foong had lodged. Her complaint of non-service was reinforced by the Judge's Minute that the papers should be served.

Had Logan Sabapathy fabricated evidence as alleged by Tan Kim Foong?

The papers filed on 13 January 1994 by Pacline's solicitors consist of the Notis Usul Pemula (enc. 1) the affidavit pertama plaintiff (enc. 2) and the certificate of urgency. Nowhere in any of these documents has been stated that Tan Kim Foong had caveated the said land for the fifth time. Indeed the affidavit clearly stated that it was Trends which lodged the first four caveats. The certificate of urgency stated that her caveat was "the fifth which had been entered" where the first, second and third had been cancelled by Court order.

The Minute by the Registrar was dated 13 January 1994. Things done in a rush are not always accurate. The Registrar mistook what was stated in the certificate and stated, "This caveat is the fifth caveat entered by the same caveator ...". With deepest respect to all concerned this remark was emphatically **not** evidence supplied by Mr. Logan Sabapathy. It was the Registrar's mistaken view of the effect of the documents Pacline's solicitors had filed.

By the time the matter came before me on 20 January 1994 a second affidavit had been filed (enc. 3A) exhibiting the full text of Tan Kim Foong's caveat and a copy of the affidavit filed for Trends in the first caveat proceedings. This affidavit was affirmed by Eng Yong Seng a Director of Trends who named the only seven sub-purchasers to whom Trends had sold units in the project. (Tan Kim Foong was not one of them). A sale & purchase agreement was also exhibited.

These documents were before me on 20 January 1994. I would now categorically state it as the opinion of this Court that the allegation that Mr. Logan Sabapathy fabricated evidence by stating to this Court that Tan Kim Foong's caveat was the fifth caveat she entered is baseless and without foundation.

The next point is the legal effect of my brother Judge's minute. This minute was made in the absence of Counsel representing Pacline, and it can only be treated as an administrative direction. It did not and could not have effect as a Court order. Order 8 r. 2 of the Rules of the High Court 1980 is self-explanatory. When the matter came before me on 20 January Pacline's solicitors were entitled urge that s. 327 (1) of the National Land Code expressly permitted them to apply *exparte*. The last part of O. 8 r. 2 is significant. It read "...and any party affected by such order may apply to the Court to set it aside."

The route which Tan Kim Foong took aided by her third-year law student goes to show how a little learning can be a dangerous thing. Section 37 of the Legal Profession Act 1976 makes it a criminal offence for an unauthorised person to act as solicitor or draw or prepare any instrument relating to any proceedings in the Malaysian Courts. The reason is simple. Giving people wrong advice may cause them to have a distorted perception of their rights and to do things which the law does not permit.

I have already referred to Tan Kim Foong's letters dated 24 February 1994 and 11 March 1994. Not content with this, on 12 May 1994 Tan Kim Foong wrote a particularly deplorable letter to my brother Judge YA K.C. Vohrah in civil suit 22-55-94 again complaining about Mr. Sabapathy's alleged fraud aforesaid. This letter she circulated to the Chief Justice, the Attorney General, the Bar Council, to me in my capacity as Judge, and to various others. I now emphasise most strongly that

such correspondence which is calculated to influence the decision of this Court is a punishable contempt. (See the commentary in the Supreme Court Practice 1979 Vol. 1 par a 52/1/6 and the cases therein cited). They were also calculated to intimidate Mr. Sabapathy in the exercise of his duties as an officer of this Court.

In the affidavits which Tan Kim Foong has since filed on 26 May 1994 and 22 June 1994, and indeed in her submissions in this Court on 24 June 1994, Tan Kim Foong has continued to vilify Mr. Logan Sabapathy on this count.

Pacline's affidavit (enc. 14) in answer to Tan Kim Foong's affidavit of 26 May avers that the allegations made by Tan Kim Foong arising out of and incidental to this baseless allegation are scandalous and should be expunged from the Court records.

In their affidavit (enc. 14) Pacline also set out at length the factual grounds why Tan Kim Foong' s caveat cannot be sustained and should not be restored. In her final affidavit Tan Kim Foong elected not to answer these factual allegations on the ground that Pacline's affidavit was irrelevant. Instead, as she did in earlier affidavit she once again included in her affidavit a tirade why the proceedings in the earlier four caveats had not been correctly decided and why I should maintain the Registrar's caveat and restore her own.

A word should be said here about *Overseas Investment Pte Ltd v. Anthony O'Brien* [1988] 3 MLJ p. 332 a decision on which Tan Soo Eng relies to contend that material allegations not contradicted are deemed to be admitted. That case can only apply to affidavits which comply with the Rules of the High Court. Order 41 r. 5(1) clearly says that an affidavit may only contain such **facts** as the deponent is able of his own knowledge to prove. Statements of information or belief in interlocutory applications must also be statements as to facts. The case cited was not intended to apply to argumentative matter, or contentious opinions. Facts are material only if they have a direct bearing on the issue to be decided.

The only issues I have to decide in this matter are whether the *exparte* order I made on 20 January 1994 should be set aside and her caveat should be restored. A collateral issue is whether the *exparte* order was obtained by the alleged fraud of Mr. Logan Sabapathy.

Tan Kim Foong's only claim in her personal capacity arises out of a claim to enforce a contract for the sale of one unit in this housing project. She a is free to pursue whatever remedies she is best advised as to this cause of action in the suit she filed with eight others on 6 June 1994.

In law, for the reasons I have stated her caveat is a nullity. Consequently her application to set aside the *exparte* order made against her on 20 January 1994 and the incidental relief she has sought in connection therewith is hereby dismissed. I would add that her attempt to graft the issue of the maintenance of the Registrar's caveat into these proceedings was misconceived and I dismiss that prayer also.

As to the unfounded allegations of fraud which have been made by her against Mr. Sabapathy it is to be hoped that this judgment will go some way to put the record straight. Since these allegations were gratituously published to third parties and are in the way of Mr. Sabapathy' s calling as an Advocate & Solicitor, I must leave him to seek any further satisfaction he requires in other aspects of the legal process.

Expunging is a selective process. I think it is premature to consider this now in the event of an appeal. At the stage when this judgment achieves finality, the matter can be reconsidered if Pacline and Mr. Sabapathy so wish. To that extent I give liberty to apply but the Court and Tan Kim Foong will need to be given notice precisely which words are to be expunged.

Finally there is the issue of costs. Mr. Sabapathy applied for a certificate for two Counsel. I am afraid I must decline this request because I think part of the problems here were created by Pacline' s solicitors' failure to serve the *exparte* order in good time i.e. before they served it on the Registrar or at least at the same time.

Finally I would once again emphasise that this Court takes a very serious view of Tan Kim Foong's letters earlier referred to. The most charitable view that I can take is that possibly aided and abetted by amateur and unqualified persons, hers was a misguided cry for justice. More stringent measures may be called for to discourage criminal libels in future. For the time being a reprimand is in order and Tan Kim Foong must pay the taxed costs of the plaintiffs.